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No. 94-757

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In The

Supreme Court of the United States

October Term, 1994

DR. PAUL P. RICCHIO and FRANK FEDELE,

Petitioners,

vs.

DR. GERALD E. POESNECKER, DR. HAROLD E. BUTTRAM and VERNON R. BRIGGS,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

Page

I. Any "Change" in Circumstances Is Irrelevant: The Presence of Two Petitioners Instead of Four Obviously Has No Effect on Justiciability. 2

II. The State Trial and Appellate Courts Extensively Addressed and Erroneously Resolved the First Amendment Issue Petitioners Ask This Court to Review 4

III. Respondents' Groundless Fears of "Chaos" Are Irrelevant to the Constitutional Questions Before the Court. 5

Conclusion 6

TABLE OF CITATIONS

Cases Cited:

Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963) 3

Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1937) 3

Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150 (1970) 3

Cohen v. Cowles Media Co., 111 S. Ct. 2513 (1991) 5

County of Riverside v. McLaughlin, 111 S. Ct. 1661 (1991) .. 3

Franks v. Bowman Transp. Co., 424 U.S. 747 (1976) 2

Contents

	Page
Powell v. McCormack, 395 U.S. 486 (1969)	3
Presbyterian Church v. Mary Elizabeth Blue Hull Mem. Presyterian Church, 393 U.S. 440 (1969)	5
Serbian Eastern Orthodox Church v. Milivojevich, 426 U.S. 696 (1976)	5
United States v. Williams, 112 S. Ct. 1735 (1992)	4, 5
United States Constitution Cited:	
First Amendment	3, 4, 5
Fourteenth Amendment	3

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Respondents advance boilerplate grounds for denial of certiorari even though no such grounds exist: (1) that the case is moot and that Petitioners lack standing because only two of the original four appellants below have petitioned for certiorari; (2) Petitioners' "creation" of an otherwise nonexistent constitutional issue, even though the issue was extensively addressed and erroneously resolved by the Pennsylvania trial and appellate courts; and (3) the threat that Petitioners' position would

engender "chaos," even though the trial court continues to preserve good order through its uncontested appointment of a custodian-receiver below.

To state these contentions is to refute them. More significantly, Respondents have underscored the merits of the instant Petition by refusing to address them: the Pennsylvania courts have contravened innumerable holdings of this Court and other courts forbidding judicial intrusion into purely religious disputes. This Court should grant certiorari to confirm the validity of its holdings and correct the gross constitutional injustice Petitioners continue to suffer.

I.

ANY "CHANGE" IN CIRCUMSTANCES IS IRRELEVANT: THE PRESENCE OF TWO PETITIONERS INSTEAD OF FOUR OBVIOUSLY HAS NO EFFECT ON JUSTICIABILITY.

Two of Petitioners' co-litigants in the proceedings before the Pennsylvania courts — each a member of the Council of Seven that voted to remove Respondent Poesnecker from his position as the Fraternity's religious leader — chose not to join the instant Petition. Respondents now contend, in a confusing argument, wholly without citation to the law or the record below, that the absence of these two persons somehow moots the controversy between the parties and deprives Petitioners of standing before this Court. Surely the number of Petitioners has no effect on justiciability.

A case is not mooted simply because two of four co-litigants have chosen to abandon their appellate rights. *See, e.g., Franks v. Bowman Transp. Co.*, 424 U.S. 747, 752-57, 781 (1976) (withdrawal of named plaintiff from class action did not moot

case as to remaining class members). Rather, mootness occurs "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496 (1969). Respondents cannot satisfy either test. The religious schism that gave rise to this litigation continues; Petitioners Ricchio and Fedele still dispute Respondent Poesnecker's claim to religious leadership; Petitioners Ricchio and Fedele continue to insist that the Pennsylvania courts were obligated to defer to the Fraternity's own resolution of this religious question; Respondent Poesnecker holds himself out to Fraternity members as the court-sanctioned Supreme Grand Master. Obviously the dispute here is "live."

Further, Petitioners are Fraternity members and thus plainly have a cognizable interest in requesting that this Court determine whether the Pennsylvania courts violated their First and Fourteenth Amendment rights by interpreting the Fraternity's religious texts and practices and identifying Poesnecker as the Fraternity's religious leader. *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 154 (1970) ("A person . . . may have a spiritual stake in First Amendment values sufficient to give standing to raise issues concerning the Establishment Clause and the Free Exercise Clause."); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 223 & n. 9 (1963). In these circumstances, the violation of Petitioners' constitutional rights both eliminates any question of "mootness" and underscores Petitioners' standing. *See County of Riverside v. McLaughlin*, 111 S. Ct. 1661, 1667 (1991) ("At the core of the standing doctrine is the requirement that a [party] allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief."); *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937) (For purposes of justiciability and standing, a case before the Court must involve a definite controversy between parties having adverse legal interests).

Finally, Respondents base their mootness argument on their belief that Petitioners may not properly sit on the Council of Seven and, hence, lack the requisite interest to petition this Court. In thus asking this Court to rule on questions of entitlement to religious office, Respondents seek to repeat and compound the constitutional wrongs committed below. Justiciability is not reasonably in question here. Petitioners, who have been litigants in this matter since its inception, obviously may now seek relief from this Court.

II.

THE STATE TRIAL AND APPELLATE COURTS EXTENSIVELY ADDRESSED AND ERRONEOUSLY RESOLVED THE FIRST AMENDMENT ISSUE PETITIONERS ASK THIS COURT TO REVIEW.

Respondents next contend that Petitioners have "created" an otherwise nonexistent constitutional claim by "misstat[ing] essential facts." Brief in Opposition, p. 5. The contention is mystifying, as both the Pennsylvania Commonwealth Court and trial court addressed and resolved Petitioners' First Amendment claim. *See* Petition, App. B, 11a-17a; App. C, 38a-41a. In light of the state courts' rulings on the merits of the claim raised here, that claim is undoubtedly now properly before this Court. *See United States v. Williams,* 112 S. Ct. 1735, 1739 (1992).

Respondents also suggest that Petitioners somehow waived their constitutional claim by introducing at trial various religious texts and by arguing to the trial court that Respondents could not use the First Amendment as a shield from judicial inquiry into Poesnecker's corporate malfeasance. The Commonwealth Court — whose strict waiver doctrine precludes its considering any issue not fully preserved at trial — explicitly rejected Respondents' waiver argument and ruled instead that Petitioners

had preserved their constitutional claim. *See* Petition, App. B, 11a. Under this Court's far more liberal waiver rules, Petitioners' constitutional claim is properly before the Court. *See United States v. Williams,* 112 S. Ct. at 1740 n. 5 (" 'It is irrelevant to this Court's jurisdiction whether a party raised below and argued a federal law issue that the state supreme court actually considered and decided.' ") (*quoting Cohen v. Cowles Media Co.,* 111 S. Ct. 2513, 2517 (1991)).

III.

RESPONDENTS' GROUNDLESS FEARS OF "CHAOS" ARE IRRELEVANT TO THE CONSTITUTIONAL QUESTIONS BEFORE THE COURT.

Finally, Respondents contend that "the rule sought by Petitioners would be chaotic" because it would undo the trial courts' resolution of the parties' religious and corporate disputes. Brief in Opposition, p. 11. This extraordinary contention would be quite beside the point if it did not underscore the Pennsylvania courts' error. Obviously, all religions would be less burdened by strife if one side or another to a religious controversy could ask the state trial court to resolve the dispute. It is that very resolution that offends the First Amendment. *See Serbian Eastern Orthodox Church v. Milivojevich,* 426 U.S. 696, 720 (1976); *Presbyterian Church v. Mary Elizabeth Blue Hull Mem. Presbyterian Church,* 393 U.S. 440, 449 (1969). Respondents' desire for good religious order — once again, offered without any supporting legal authority — is, thus, irrelevant to Petitioners' constitutional objections.

Respondents also suggest that judicial resolution of the religious leadership question was somehow essential to administering the Fraternity's "ownership of property,

contractual matters and financial affairs . . ." Brief in Opposition, p. 11. Yet, as the record shows, the trial court granted the parties' joint petition to appoint a custodian-receiver, who is presently administering the very fiscal matters that are the subject of Respondents' concern. *See* Petition, App. C, 54a-58a. Thus, Respondents' fears of "chaos" — to the extent they are at all germane — are groundless.

In sum, Respondents' creative re-casting of the facts and law supposedly at issue here cannot change what the opinions below show: Pennsylvania courts have ruled that they alone in the nation may constitutionally resolve a religious leadership dispute and thus, effectively, select a religious leader. A clearer case for certiorari is unlikely to arise.

CONCLUSION

Thus, for the reasons stated in the Petition, the writ of certiorari should be granted.

Respectfully submitted,

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